

JAN 16 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.;
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES;
PARENT CREDITORS COMMITTEE OF THE LTV CORPO-
RATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF
EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.;
FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK;
CITIBANK, N.A.; DAVID H. MILLER; and WILLIAM W.
SHAFFER,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF OF RESPONDENT, OFFICIAL COMMITTEE
OF EQUITY SECURITY HOLDERS**

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QUESTIONS PRESENTED

Respondent Official Committee of Equity Security Holders ("Equity Committee") adopts the Questions Presented as rephrased in the brief of the Respondents The LTV Corporation, *et al.*

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**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

This case involves The Fifth Amendment to the United States Constitution, the statutes referred to in the briefs of the Petitioner and the Respondents, The LTV Corporation, *et al.*, and the Administrative Procedure Act, 5 U.S.C. §§ 554(c), 556(a) and (e), 557(a) and (c) and 706(2)(A), (D) and (E). See Appendix A to this brief.

STATEMENT OF THE CASE

This case concerns the ongoing effort of The LTV Corporation, its creditors and equity holders to restructure LTV's obligations—including its pension obligations—in a Chapter 11 case under the United States Bankruptcy Code.

On or about July 17, 1986 (the "Petition Date"), LTV and sixty-six related affiliates, including LTV Steel Company, Inc. (collectively, the "Debtors" or "LTV"), filed petitions for reorganization under Chapter 11 of Title 11, United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). The cases have been consolidated procedurally and are being jointly administered pursuant to an order of the Bankruptcy Court.

The principal reason given by the Debtors for filing the Chapter 11 petitions was the need to resolve their multi-billion dollar pension liability problem. As of the Petition Date, LTV Steel was the plan sponsor of four single employer defined benefit pension plans (the "Plans"), as defined by ERISA. LTV was the plan administrator of the Plans, as defined by ERISA, 29 U.S.C. § 1002.

Almost immediately after LTV filed its Chapter 11 petitions, the Pension Benefit Guaranty Corporation ("PBGC") became an active player in the drama. LTV Steel took the position that its bankruptcy filing prevented it from making pension plan payments except by order of the Bankruptcy Court because such contributions would otherwise constitute an improper payment of pre-petition debts. As a result, on August 28, 1986 LTV Steel applied to the Internal Revenue Service ("IRS") for a waiver of its minimum annual pension funding obligations in the amount of \$215 million for the four LTV Steel Plans for the plan year ending December 31, 1985. On September 30, 1986 the District Court entered an order, with the consent of LTV, terminating one of the Plans pursuant to the involuntary termination provisions of ERISA, 29 U.S.C. § 1342. The terminated Plan is not at issue in this case.

In November, 1986 the IRS, after consultation with PBGC, denied LTV Steel's funding waiver requests for the three remaining Plans for the plan year 1985 in the amount of \$205 million, and additionally revoked the previously granted waiver for plan year 1984 in the amount of \$175 million.

On December 15, 1986, PBGC staff personnel in the form of a "SEPPAA Trusteeship Working Group" met to determine whether to terminate the three remaining Plans involuntarily because of (1) the denial (in which PBGC had played a role) of funding waivers by the IRS which left the Plans in violation of the minimum funding standards; and (2) the views of Mr. Mike Wells, Associate Director, Insurance Operations Department and senior financial person for PBGC, that "the probability that LTV can survive with the Plans intact is 'de minimis.'" JA 121-24.

PBGC's Working Group met twice more on December 18, 1986 and January 5, 1987, and recommended involuntary termination of the three Plans to the agency's Executive Director, after the Group concluded that "LTV could not afford to maintain the Plans," and that a projected and optimistic \$300 million cash flow per year and a "cash build-up of just over \$1 billion by the end of 1988 would not be sufficient to finance a plan of reorganization and the ongoing Plans." The group's conclusion was that the termination must occur "now or later." JA 128-31, 137-40.

On January 12, 1987, upon application by PBGC and consent of LTV, the District Court entered orders terminating the Plans pursuant to the involuntary termination provisions of ERISA, 29 U.S.C. § 1342. JA 141-42; See also AR 1533-41. As a result of the terminations of the Plans, PBGC became the statutory guarantor and trustee of each Plan, and was vested with complete authority and control

¹As utilized in Petitioner's Brief, references to the Joint Appendix are designated herein as "JA," and to the Administrative Record as "AR". References to the Appendix to the Certiorari Petition are designated herein as "Pet. Appx." with the letter "a" following the indicated pages, and to the Equity Committee's Appendix to its Certiorari opposition as "Resp. Eq. Appx." with the letter "a" following the indicated pages.

over the administration of each Plan. PBGC also became liable for funding the payment of a portion of the non-forfeitable benefits due beneficiaries under the Plans.

The United Steelworkers of America ("USWA" or "Union"), the collective bargaining representative for hourly-paid employees of LTV Steel, strenuously objected to termination of the two plans for hourly employees and to the resulting reduction in benefits paid to its members. The Union unsuccessfully appealed the termination orders and also filed suit in the Bankruptcy Court on January 16, 1987, seeking to obtain payment of benefits under the Plans on the grounds that the reduction in pension benefits constituted a breach of the existing collective bargaining agreement between the Union and LTV Steel and section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113. The Union also threatened a strike if its demands remained unsatisfied. Fearing that a strike would paralyze the Debtors early in their reorganization effort, and prepared to alleviate some of the hardships imposed on active and retired employees, LTV Steel took the steps needed to address the Union demands, including the negotiation of an interim collective bargaining agreement. LTV Steel obtained Bankruptcy Court approval to make a single hardship payment to retirees affected by the Plan terminations. Additionally, LTV Steel and the Union entered into a modified collective bargaining agreement to remain in effect only until the earlier of confirmation of a plan of reorganization for LTV Steel or April, 1990 (the "Interim Agreement"). JA 275-310, at 282. The Interim Agreement resolved the Union's lawsuit by granting its members some additional pension benefits. Over the objection of PBGC, a voluntary and active participant in the bankruptcy proceedings, the Interim Agreement was approved by the Bankruptcy Court on July 30, 1987. AR 1554-56. The Bankruptcy Court, the District Court and the Court of Appeals denied PBGC's applications to stay the implementation of the Interim Agreement.

Immediately thereafter, PBGC asserted that the benefit

plans provided by the Interim Agreement were nothing more than abusive "follow-on plans" that allowed LTV Steel to offer as high a level of benefits to present and former employees as had been provided by the terminated Plans while shifting a substantial portion of the costs to PBGC. JA 312-18. On August 12, 1987, the SEPPAA Trusteeship Working Group, without a formal hearing, issued a recommendation that the three LTV Steel Plans be restored to prevent the so-called abuse of the pension insurance program. This recommendation was based upon the Working Group's conclusions that: (1) LTV Steel had established abusive follow-up plans which provided substantially the same benefits to present and former employees as the terminated Plans and were partially funded by PBGC; (2) the improvement in LTV Steel's financial position in the six months since termination of the three Plans at issue justified restoration; and (3) LTV Steel had demonstrated a willingness to fund its employee retirement Plans. JA 319-20.

These conclusions contain obvious substantive and procedural problems for PBGC. First, the finding of improvement in LTV Steel's financial position was a dramatic turnaround from PBGC's conclusion, when the Plans were terminated just over six months earlier, that LTV lacked the long-term capacity to fund them. Second, PBGC never acknowledged any responsibility to work within the bankruptcy framework to assist plan beneficiaries while a court-supervised reorganization was in progress and never explained how the Interim Agreement was "abusive" or how PBGC's long-run financial concerns had been dispelled by LTV's sudden, short-term improvement. Before making a decision, the Executive Director consulted with the Board of Directors of PBGC which upheld the authority of the Executive Director to determine when particular plans should be restored. Pet. Appx. 180a-81a; JA 363.

On September 22, 1987, PBGC issued a notice of restoration, pursuant to ERISA section 4047, directing the restoration of three of the terminated LTV Steel Plans to their

pretermination status. Appx. 182a-83a. PBGC commenced this lawsuit to enforce its notice of restoration on October 9, 1987, in the United States District Court for the Southern District of New York. LTV then brought an action in the Bankruptcy Court alleging that restoration violated the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a). The District Court granted PBGC's motion to withdraw LTV's action from the Bankruptcy Court and considered both actions together.

The District Court denied PBGC's motion for summary judgment on June 22, 1988, and by judgment dated September 7, 1988 vacated PBGC's notice of restoration and remanded to PBGC for further proceedings. While the District Court upheld the power of PBGC to restore previously terminated plans, that court ruled that the agency had acted arbitrarily and capriciously in failing to observe the standards of the Administrative Procedure Act ("APA"). The court, in effect, drew a roadmap for the agency outlining the steps in plan restoration.

Instead of accepting the remand, PBGC appealed. On May 12, 1989 the United States Court of Appeals for the Second Circuit found, *inter alia*, that PBGC exceeded the bounds set by statutory procedures and permissible discretion because (1) PBGC could not restore the LTV Steel Plans solely by claiming that the Interim Agreement with USWA set up abusive follow-on plans; and (2) PBGC could not ignore the minimal procedures mandated by the APA in making the factual findings of improved economic circumstances and in failing to consider the impact of central policies of federal bankruptcy and labor laws applicable to this bankruptcy reorganization in reaching its decision. The appellate court also drew a roadmap outlining the steps in plan restoration for the agency. Not satisfied with the District Court and Court of Appeals decisions, PBGC still refuses to accept the remand and presses this appeal.

SUMMARY OF ARGUMENT

Although Section 4047 (29 U.S.C. § 1347) of the Employee Retirement Income Security Act of 1974 ("ERISA") permits PBGC to restore terminated benefit plans, Congress set no substantive standards for such restoration, or for the procedure to be utilized by the agency other than as articulated in the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

In considering restoration, PBGC should have provided a "reasoned analysis" for its actions, and should have followed APA procedures. In so doing, it should have considered the cross-currents involved in the impact of its actions on the bankruptcy law and—LTV employing many thousands of persons—on the labor law. However, PBGC failed to do so, and the administrative record allegedly supporting the restoration order reveals such woeful inadequacies as to be "arbitrary and capricious," as unanimously found by both federal courts below.²

²There is at least some question as to whether the Court of Appeals for the Second Circuit had appellate jurisdiction, and so whether this Court's review should lie. The Court of Appeals noted that all of the instant Respondent Equity Committee's claims were not disposed of by the District Court. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 875 F.2d 1008, 1013-15, 1021 (2d Cir. 1989). And Fed. R.Civ.P. Rule 54(b) provides for the entry of an appealable "final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay...." Such a determination was here made by the District Court. Pet. Appx. 132a. But a statement by a District Court that "there is no just reason for delay" should not routinely issue, generating piecemeal appeals. *Panichella v. Pennsylvania R. Co.*, 252 F.2d 452, 454-55 (3d Cir. 1958), cert. denied, 361 U.S. 932 (1960). Considering the propriety of permitting an appeal, the appellate court must "scrutinize the district court's evaluation of such factors as the inter-relationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units." See *Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980). In exercising its appellate jurisdiction here, the Court of Appeals suggested that "strict technical compliance" with Rule 54(b) might, possibly, have barred its exercise of jurisdiction:

In the instant case, it is more judicially efficient for us to exercise jurisdiction and reach the merits of the dispute now rather than cause a delay by demanding strict technical compliance with the certification requirement.

Insofar as PBGC's action was premised upon purported improvements in LTV's financial condition, the record only reflects PBGC's evaluation of that financial condition for a period of five months prior to the restoration order. No projection of LTV's long-term financial condition is reflected any place in the record, and so—for all that the record reveals—there would be considerable peril of retermination of the three Plans at issue.

Moreover, PBGC expresses concern that its own action of terminating the Plans burdens it with a liability of more than two billion dollars threatening its own financial soundness, and posing inequitable burdens on those who, pursuant to law, are compelled to fund PBGC. This two billion dollar projection, however, is demonstrably unsound.

Were the PBGC restoration directive to be effective, PBGC's failure to have considered the pending proceedings in the Bankruptcy Court, and the impact of PBGC's actions on LTV's creditors and equity holders and its labor force, would endanger the Chapter 11 reorganization, and hence LTV's ability to continue operations and its employment of tens of thousands of working people.

PBGC's conclusion that the Plans were to be restored because LTV had created so-called abusive "follow-on plans" is not only without statutory authority, and at odds with ERISA's Congressional history, but is unsupported by any side-by-side comparison of the Plans and the mislabeled "follow-on plans."

Indeed, PBGC's restoration decision is arbitrary and capricious, having taken place without formal hearings and any opportunity of LTV to present evidence and to cross-examine witnesses. PBGC's restoration decision, indeed, was made at the very moment that the Office of PBGC's Executive Director was in negotiations with LTV representatives on possible modes of resolving the LTV/PBGC differences and had falsely given LTV assurances of advance notice if PBGC action was to be taken.

Overall, PBGC's action so failed to accord LTV reason-

able administrative safeguards as to deprive it of minimal due process protections, and—were the PBGC's administrative mandate to be enforced—to threaten the assets being administered in the Chapter 11 cases and to seriously endanger LTV's ability to reorganize.

ARGUMENT

I. THE PBGC ACTION, PROPERLY BRANDED BELOW AS "ARBITRARY AND CAPRICIOUS," CANNOT SURVIVE STATUTORY AND CONSTITUTIONAL SCRUTINY.

A. PBGC'S Restoration Authority, When Properly Exercised, Is Beyond Dispute.

Section 4047 of ERISA expresses Congress' clear statutory grant of authority to PBGC to restore terminated pension plans. In pertinent part the section reads:

In the case of a plan which has been terminated under section 1342 of this title, the corporation [PBGC] is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pre-termination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347 ("4047").

In its Brief PBGC notes that Congress enacted extensive amendments to ERISA in the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), that one of the SEPPAA provisions amended Section 4047 and, with that as a jumping off point, states that "[t]he legislative history therefore confirms what the plain language of the statute says—that Congress granted PBGC the discretion to decide when to restore pension plans, and that it intended

the agency to do so whenever the PBGC determines that restoration is 'appropriate and consistent' with its statutory duties." (Pet. Brief, p. 23.)

If anything is clear in the SEPPAA Amendments to Title IV, it is that Congress intended to limit voluntary terminations of single employer pension plans and to enhance PBGC's ability to force a quick and final judicial decree of involuntary termination. SEPPAA expanded the period involved in the filing of a notice of intent to terminate from ten to sixty days (29 U.S.C. § 1341(a)(2)), precluded PBGC from processing a termination when an existing collective bargaining agreement was in force (28 U.S.C. § 1341(a)(3)), and severely limited an employer's ability to voluntarily terminate an underfunded plan for purely financial reasons to those situations where an employer was bankrupt, or in a reorganization case after the Bankruptcy Court approved the termination because the employer would be unable to stay in business and pay its debts when due (29 U.S.C. § 1341(c)).

Congress permitted PBGC to use a "simplified procedure" for involuntary terminations of small plans (29 U.S.C. § 1342(a)), and made it clear that PBGC could involuntarily terminate a plan despite the pendency of a bankruptcy or reorganization case (29 U.S.C. § 1342(c)). Although the 1986 amendments made conforming changes to section 4047, Congress did not deal with or even discuss PBGC's ability to restore a previously terminated plan.

Yet, and with virtually no record to support its restoration decision, in September 1987 PBGC directed the restoration of the earlier terminated Plans, thereby seeking to relieve PBGC of the fiscal obligations it had assumed on their termination, and returning to the LTV entities, their creditors and equity holders, in Chapter 11, the funding obligations associated with the Plans which had precipitated, in part, the bankruptcy filing.

Recognizing that deference must ordinarily be given to an agency's interpretation, the judicial branch and not the executive branch of government is the "final authority on

issues of statutory construction." *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 n.9 (1984); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133 (D.C. Cir. 1984). As the D.C. Circuit so aptly noted:

[I]n ascertaining the congressional intent underlying a specific provision, we are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history.

Rettig, 744 F.2d at 141.

B. As the Courts Below Ruled, the PBGC's Authority to Restore Was Not Properly Exercised.

PBGC cannot dispute that, as an administrative agency, it is subject to the provisions of the Administrative Procedure Act, and that it is not free to act on its own misplaced pronouncements of policy, not in accordance with its Congressional mandate. See, e.g., *Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839, 844 (D.C. Cir.), cert. denied, 469 U.S. 880 (1984); *A-T-0, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1019 n.10 (6th Cir. 1980).

The Administrative Procedure Act requires the reviewing court to "set aside agency action...found to be...arbitrary, capricious, an abuse of discretion." 5 U.S.C. § 706(2)(A). An agency's action must also be set aside when not in accordance with procedures required by law (5 U.S.C. § 706(2)(D)), or when not supported by substantial evidence (5 U.S.C. § 706(2)(E)). And applicable provisions specify the right to a hearing, with proposed findings and conclusions (5 U.S.C. §§ 554(c), 556(a) and (e), and 557(a) and (c)), none of which were here afforded. This Court, in directing the amendment of an order of the Interstate Commerce Commission in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962), referred

to the Administrative Procedure Act when noting:

There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. [Authorities omitted] Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.

The Equity Committee position, that PBGC's action is without necessary support in the record, was—after quite complete and lengthy analysis—accepted by both courts below. Each court ruled that the agency could not restore the Plans without following procedures mandated by the APA, which it had not done, and without giving due regard—which, on the record, it had not given—to the applicable provisions of federal bankruptcy and labor law as well as ERISA.

PBGC, having terminated the Plans in January 1987, acted to restore them in September of that year. This Court, in *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), considering the question of judicial review of agencies' rulings, noted "[a]n agency interpretation...which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view". And in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983), this Court declared that "an agency changing its course...is obligated to supply a reasoned analysis for that change beyond that which may be required when an agency does not act in the first instance."

PBGC, however, supplied no "reasoned analysis." Indeed, here the appellate court below, in rejecting the

PBGC's summary judgment motion, noted:

In the instant case, PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a plan sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying those standards. Failure to do any of these things renders the decision arbitrary and capricious.

* * *

On remand, PBGC may be able to justify its decision. However, based on the administrative record presented to the District Court and to us, its decision cannot be upheld. Because PBGC's decision was not sustainable on the administrative record, the District Court provided the appropriate remedy by vacating PBGC's Restoration Notice and remanding the matter to PBGC. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978); *Camp v. Pitts*, 411 U.S. at 143.

875 F.2d at 1021.

In reviewing the "arbitrary and capricious" finding by the courts below, this Court will weigh whether PBGC's decision was based upon "consideration of the relevant factors and whether there has been a clear error of judgment." See, *Marsh v. Oregon Natural Resources Council*, ___ U.S. ___, ___, 109 S. Ct. 1851, 1861 (1989); see also *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) ("The agency must articulate a 'rational connection between the facts found and the choice made'"); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Here, despite the soundness of judicial review of agency decisions (see Point I D, *infra* at p. 24), the essence of PBGC's position is that it—PBGC—is the law; involuntary restoration of the Plans is appropriate principally because PBGC wills it, and Congress having given it the power to restore pension plans, PBGC's judgment as to the manner of the exercise of those powers is not to be questioned.

C. In a Number of Critical Areas, the PBGC's Action Was Taken Without Adequate—or Any—Foundation.

An agency has acted arbitrarily when, choosing or implementing a particular course of action, it has:

- (1) relied on factors that Congress did not want it to consider; (2) failed to consider an important aspect of the problem; (3) given an explanation for its decision that is contrary to the evidence before it; or (4) given an explanation so implausible that it cannot be ascribed to any view of the facts or to the agency expertise.

New York Council, Association of Civilian Technicians v. Federal Labor Relations Authority, 757 F.2d 502, 508 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985). Yet these are the sorts of failings that were here indulged in—as noted by the courts below—by PBGC in arriving at its restoration directive.

1. *PBGC's claim of improvement in LTV's financial condition.* In taking its September 1987 action directing the Plans' restoration, the PBGC found, and in part relied upon, purported adequate LTV financial improvement—since January of that year—to justify restoration. In this regard the appellate court below noted:

While improvement in financial circumstances is a basis for restoration the administrative record does not support PBGC's finding that LTV's finan-

cial circumstances had improved substantially enough to justify restoration.

Interestingly, ERISA contains no standard by which to determine whether an employer can afford to resume liability for terminated pension plan programs. PBGC was thus left to its own discretion in assessing the financial well being of LTV. We believe that its assessment was erroneous.

875 F.2d at 1018.

The Equity Committee concedes that, when appropriate due to experience gains or increased funding, the PBGC has authority to end ongoing termination proceedings and to restore a plan to its former status. H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58. Yet here no long-term funding capacity is reflected in the record, nor does PBGC claim such long-term funding capacity has been found to exist. And PBGC's actions here in examining LTV's income trend for a mere handful of months also is inconsistent with earlier PBGC opinion letters addressing proposals for plan restoration. PBGC had previously consistently required plan sponsors to demonstrate the long-term capacity to fund plans and to avoid any prospective necessity for retermination. See, e.g., PBGC Opinion Letter 83-5 (February 2, 1983) (Resp. Eq. Appx. 5a-6a) ("The Company agrees that it will not...terminate the Plan for at least five years after the date of the restoration of the Plan"); PBGC Opinion Letter 82-11 (April 1, 1982) (Resp. Eq. Appx. 1a-4a); PBGC Opinion Letter 77-132 (February 18, 1977) (Resp. Eq. Appx. 7a).

In this case, the administrative record is devoid of any consideration of the possibility of retermination. This is clearly inconsistent with the role of PBGC and the goals of ERISA. Restoration, without a reasoned determination of how LTV Steel would be able, going forward, to fund the Plans in a way highly unlikely to lead to retermination,

threatens the interests of the LTV entities, their creditors, their equity holders, plan participants, all PBGC premium payers and of PBGC itself.

In rejecting PBGC's finding that LTV's changed financial circumstances justified restoration of the Plans, the Court of Appeals identified several significant deficiencies in PBGC's administrative record including: (1) a summary financial analysis that reviewed LTV's income trend only for a five month period; (2) PBGC's assumption that LTV would be able to obtain funding waivers from the Internal Revenue Service for the years 1984 through 1986 and after, despite the fact that the IRS had denied LTV's request for a waiver for 1985 and had revoked a waiver for 1984; (3) PBGC's assumption that pension savings based upon job reductions in the Interim Agreement would be preserved in future labor agreements when the Union would be less likely to grant such concessions; and (4) PBGC's complete failure to assess the impact of LTV's status as a Chapter 11 debtor on its financial condition. 875 F.2d at 1018-20. The Court of Appeals criticized PBGC for focusing on LTV's short-term economic conditions, without considering the long-term implications of plan restoration, including the likelihood of retermination. 875 F.2d at 1020.

2. *PBGC's claim of its assumption of a "two billion dollar" liability.* PBGC and the Solicitor General urge that barring restoration of the Plans, the PBGC will be assuming in excess of two billion dollars of LTV liabilities (Petitioner's brief, pp. 4, 8-9; Solicitor General's brief, pp. 7, 16 at n.10), and that this endangers PBGC and massively saddles gigantic expense upon those entities compelled to support it.

But this two billion dollar figure is far, far in excess of the real cost to the PBGC resulting from its being temporarily required to fund a portion of the Plans' liabilities. In fact, the two billion dollar figure is not the present cost of projected PBGC outlays during the Chapter 11, and pending remand. The assets of the Plans are sufficient to fund current payments to beneficiaries at ERISA mini-

mum guaranteed levels, so that PBGC has not been required to make any payments from the insurance fund. The two billion dollar figure is the present value—apparently, as calculated by PBGC—of its projected payment stream for the remainder of the lives of participants in the three Plans, over many decades, after plans of reorganization presumably would long since have been confirmed by the Bankruptcy Court.

Even as such it is defective. The PBGC calculation uses an annuity interest rate, in the seven percent range; if a realistic market rate had been used—several percentage points higher to reflect PBGC's actual rate of return on assets—the projected underfunding would have been seen as dramatically less.

3. *PBGC's failure to adequately consider the Bankruptcy Court proceedings.* The Court of Appeals rejected PBGC's claim that the agency need not have considered the policies of federal labor law and of federal bankruptcy law implicated by its actions. 875 F.2d at 1015-16. Given that the legislative history of ERISA section 4047 demonstrates conclusively that changes in financial circumstances were the central factor for determining when restoration should be ordered (see discussion, *infra*, at p. 21), and given PBGC's ongoing voluntary participation in the bankruptcy proceedings, it is difficult to see how consideration of LTV's bankruptcy filing and the policy concerns of bankruptcy law could have been ignored by the agency.

Administrative agencies must always consider the impact of their decisions on other national policies and concerns, and competing concerns must be accommodated. *Burlington Truck*, 371 U.S. at 172-73. In *Burlington Truck* the Supreme Court directed a lower court to remand proceedings to the Interstate Commerce Commission because of the Commission's failure to have fully considered the impact of its decision on national labor policy and the requirement of federal labor laws.

The consideration of competing policies and statutes is particularly important here because of the critical status

of the reorganization proceedings, and the impact of those proceedings on tens of thousands of participants in the Plans, and upon hundreds of thousands of creditors and equity security holders. PBGC itself had participated in the Bankruptcy Court proceedings, vigorously objecting there to that court's approval of the LTV/United Steelworkers 1987 collective bargaining agreement which had adopted the interim pension plans. Having been unsuccessful there, PBGC's Notice of Restoration ignored—and, in effect, sought to undo—the collective bargaining agreement and the Interim Plans that had received Bankruptcy Court approval.

To make a reorganization most viable, the Bankruptcy Code—upon the commencement of reorganization proceedings—precludes a debtor from paying pre-petition debts, without Bankruptcy Court approval, which approval is granted upon finding that such action will not hamper the reorganization effort. See 11 U.S.C. § 362. The goal of the automatic stay of payment of pre-petition debts is to enable debtors, their creditors, owners and others to jointly formulate plans for the satisfaction of pre-petition claims (such as most of the claims for funding the Plans). *Perez v. Campbell*, 402 U.S. 637, 648 (1971). But PBGC appears to have assumed that upon its ordered restorations, LTV would—or at least should—recommence funding the Plans as if nothing had happened.

Most of the funding obligations, however, are pre-petition liabilities for past service rendered by covered employees, which obligations may not be payable without Bankruptcy Court approval. The existence of conflicts and restraints created by problems of the Bankruptcy Code may well render unilateral, unconditional administrative restoration, as attempted by PBGC, unworkable because, absent Bankruptcy Court approval, LTV cannot perform that which PBGC seeks to achieve in its Notice of Restoration. The record's failure to answer the question of feasibility reinforces the conclusion that PBGC's non-consideration of those restraints was capricious.

PBGC's failure to consider and attend upon the alternative of restoration in the context of a plan of reorganization—which could serve to protect the interests of all concerned parties, including the agency itself—should make it impossible for this Court to conclude that the rescission of termination was the product of reasoned decision making. *Cf. State Farm*, 463 U.S. at 52. While an agency is not required to review every conceivable policy alternative, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978), it must consider those alternatives “within the ambit of the existing standard.” *Id.*

It is at least arguably improper for an agency not to review less drastic policy alternatives. See *State Farm*, 463 U.S. at 46 and 51. Restoration as an incident of a plan of reorganization would be one example of such a less drastic alternative. However, for PBGC to craft restoration upon viable economic terms requires a searching examination of LTV Steel's ability to fund the Plans—a searching examination not engaged in by PBGC. What PBGC has done instead is to stubbornly insist upon adherence to a policy it has purportedly promulgated, that so-called “follow-on plans” are abusive of the pension insurance system.

4. *PBGC's conclusion that the Plans constitute abusive follow-on plans.* This case presents a problem PBGC has never addressed previously and has been unwilling to consider in a responsible manner throughout this proceeding. That problem is whether an entity like LTV, compelled by economic necessity to seek Bankruptcy Court protection in order to confront its many financial problems and the burden of its pension obligations, can be found to have established so-called abusive “follow-on plans,” if, after its original Plans were involuntarily terminated, the company agreed to establish interim plans limited to the duration of the reorganization. As noted, LTV Steel's interim pension plans were part of a collective bargaining agreement, approved by the Bankruptcy Court, that had been negoti-

ated under the threat of a strike that would have affected LTV's ability to reorganize. PBGC has promulgated no regulations applicable to this situation, has issued no relevant opinion letters and, in fact, has refused to recognize the problem once it arose.

In recommending restoration of the Plans, the agency relied, at least in part, upon its conclusion that the Interim Agreement negotiated between LTV Steel and the Union, and thereafter approved by the Bankruptcy Court, created abusive follow-on plans, plans essentially the same as those that PBGC had terminated, but designed to pass a major portion of the financial burden from LTV Steel to PBGC.

As a basis for restoration, this conclusion is doubly defective: (i) the PBGC's administrative record failed to demonstrate near identity between the Plans terminated by PBGC and the interim plans, and (ii) ERISA's legislative history fails to condemn follow-on plans, if this is in fact what they are.

First, in affirming the District Court's finding that that agency's action was "arbitrary and capricious," the United States Court of Appeals for the Second Circuit concluded, "PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the [Interim Plans] were merely continuations of the old Plans." 875 F.2d at 1017. This failure by PBGC leaves a vacuum wholly unsupportive of the novel contention PBGC makes, namely that a reorganizing debtor's interim pension plans, established pursuant to a collective bargaining agreement and Bankruptcy Court approval, after termination of the preexisting Plans, constitute "abusive follow-on plans."

Second, even had the record here established that the court-approved interim plans were follow-on plans, the legislative history of the most recently enacted amendments to Title IV, the Pension Protection Act of 1987 ("PPA") (subtitle D of Title IX of the Omnibus Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987)) clearly shows that Congress considered and rejected the idea of outlawing "follow-on plans." In 1987 at least four Congressional

committees proposed legislation to amend Title IV. The legislation proposed by the Ways and Means Committee of the House of Representatives included a provision prohibiting "plan re-establishments." No other committee's bills included such a prohibition. This proposal was rejected by the Conference Committee. H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. at 879-85, reprinted in 1987 U.S. Code Cong. & Admin. News 2313 - 1625-31].

To the extent that Congress can be said to have spoken to abusive follow-on plans, its concern was that solvent, healthy employers might promise to increase plan benefits while shifting the major burden of pension payments to PBGC for an indefinite period by terminating the underlying plans. To the contrary, in situations such as the present one, Congress "[a]cknowledg[ed] that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 367 n.12 (1980).

The Court of Appeals recognized that Congress acknowledged that the situation in this case, in which an interim plan is approved by the Bankruptcy Court solely to further the reorganization effort, is not an abusive follow-on plan. 875 F.2d at 1016-17.

Furthermore, Congress never intended that restoration be ordered as a response to the creation of follow-on plans. 875 F.2d at 1017. Instead, Congress intended for section 4047 restoration to be ordered only when a company's financial circumstances were found to have improved, essentially reversing the statutory grounds for termination: the prospect of an unreasonable long-run loss to PBGC. *Id.* (citing H.R. Rep. No. 1280, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 5038, 5157-58). Congress continued this policy choice when it enacted the SEPPAA amendments to ERISA, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986), and once again did not consider whether a follow-on plan constituted grounds for restoration. *Id.* (citing H.R. Rep. No. 241, 99th Cong., 2nd

Sess., pt. E at 51-55, reprinted in 1986 U.S. Code Cong. & Admin. News 685, 709-713).

PBGC's reliance on its two opinion letters condemning follow-on plan abuse does not support its position. Both PBGC Opinion Letter 81-11 (May 11, 1981) (Pet. Appx. 159a-64e, and AR 198-202) and PBGC Opinion Letter 86-27 (December 17, 1986) (Pet. Appx. 172a-79a, and AR 211-16) deal with solvent employers attempting to use PBGC to subsidize the cost of ongoing plans for employees of an ongoing business. Both opinions claim, without any significant authority, that Congress intended for section 4047 to be used to remedy follow-on plan abuse. But even were that premise correct, neither opinion even suggests that the establishment of an interim plan, as an exigency of survival in reorganization proceedings under Bankruptcy Court supervision, is a proper ground for restoration.

The threatened national calamity, envisioned by PBGC and the Solicitor General and other *amici*—arising from LTV's actions in seeking the protection of the Bankruptcy Court to reorganize and to restructure its pension obligations—has not materialized. No major corporate entities have followed LTV Steel into bankruptcy merely to terminate their pension plans and to shift burdens to PBGC. The LTV cases stand alone in their impact upon the insurance system because of the amount of unfunded pension benefits. Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation, who have filed a brief *amicus curiae* in support of PBGC, have not followed LTV into bankruptcy, even though they have comparable pension obligations.

In context it becomes clear that PBGC has overreacted to the interim arrangement between LTV Steel and the Union that provides certain pension benefits that supplement the ERISA minimum guaranteed by PBGC on a temporary basis, i.e., until the earlier of confirmation of a plan of reorganization by LTV Steel or April 1, 1990. Indeed, because of the present posture of the LTV reorganization cases and the unresolved claims of PBGC, LTV Steel must

soon commence negotiations with the Union for a new labor agreement.

In seeking to enforce its self-proclaimed policy against so-called "follow-on plans," PBGC has been blind to the consequences of its actions which have delayed the reorganization of LTV to the disadvantage of its many thousands of creditors, equity holders and work force. But for this stubborn adherence to policy by PBGC these bankruptcy cases could have produced a consensual plan of reorganization during the three and one-half years since the filing.

5. *PBGC's September 22, 1987 pre-ordained restoration action.* On September 22, 1987 the Principal Deputy Executive Director of PBGC (Dellinger) met with LTV representatives considering various "options" that the agency then apparently believed it had. AR 1575-76. Dellinger had earlier enumerated the possible alternatives, on September 14, 1987, in a letter to Raymond Hay of LTV, stating that the "options", as purportedly seen by PBGC, were (1) restoration, (2) equitable adjustment, i.e. reducing PBGC payment to retirees to reflect payments made by LTV, (3) continuation of existing litigation, and (4) to do nothing. AR 668-69. Yet the administrative record is devoid of any internal agency references to any option other than restoration. One month before Dellinger's letter, on August 13, 1987, PBGC staff already had recommended immediate restoration, and had not outlined a single alternative form of action. AR 630-36. The staff reiterated the recommendation without modification on September 18, 1987. AR 640-45.

The illusory—and misleading—suggestion that PBGC, in good faith, gave due consideration to alternatives to restoration is dramatically demonstrated by PBGC's Executive Director Utgoff's September 22, 1987 Notice of Restoration—issued the very day of the PBGC-LTV meeting discussing "options"—which Notice was effective at 10:30 that morning and was specified to be "not subject to administrative review by the PBGC...." Compare AR

1575-76 with 1578-79.

Dellinger, on that very day, had "reiterated" to the LTV representatives that "we would give them as much advance notice as possible"! AR 1576.

D. PBGC's Failure to Have Accorded Procedural Due Process Vitiates Its Notice to Restore.

This Court has consistently ruled that delegations of authority by Congress to administrative agencies do not deprive the judiciary of its responsibilities—soundly exercised here by the Courts below—to police and curtail unbounded administrative power. *See, e.g., Burlington Truck*, 371 U.S. at 167 ("Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body"); *Bowen v. Georgetown University Hospital*, ___ U.S. ___, 109 S. Ct. 468, 474 (1988); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988); *New Haven Inclusion Cases*, 399 U.S. 392, 432-33 (1970); *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 91-92 (1968); *National Labor Relations Board v. Metropolitan Life Insurance Company*, 380 U.S. 438, 442-43 (1965); *United States v. Merz*, 376 U.S. 192, 198-99 (1964).

PBGC's failures, noted by the Court below—to have informed LTV of the materials on which it was to base its decision, to provide an adequate opportunity to tender contrary evidence, to utilize ascertainable standards in evaluating LTV's financial condition, to provide a statement of its reasoning, and the like (875 F.2d at 1021)—render reasoned judicial review of PBGC's actions impossible. Indeed, these arbitrary actions, threatening to deprive all LTV entities including the Equity Committee of assets in which all have a stake, are violative of that due process guaranteed by the Fifth Amendment to the United States Constitution. *See Matthews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individ-

uals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment"); *cf. Atkins v. Parker*, 472 U.S. 115, 128 (1985) ("[T]he procedures that are employed [administratively, re the food stamp program] must comply with the commands of the Constitution").

Considering PBGC's entire procedural record here, the Court of Appeals noted:

[W]hen assessing an agency's actions under the arbitrary and capricious standard, it is a principle of fundamental fairness that

[a] party is entitled...to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that [it] may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n.4, (1974).

875 F.2d at 1020-21.

If this Court, as here urged, affirms the action below, denying PBGC's motion for summary judgment (which, essentially, sought enforcement of its Notice of Restoration), the matter will thereby be remanded to PBGC. It, acting pursuant to relevant provisions of the APA, can then appropriately evaluate LTV's financial condition and explore the interplay of ERISA, the bankruptcy law (and LTV's position in Chapter 11) and the labor law, and can consider LTV's ability to fund the Plans. Some rapprochement among competing interests can then be accomplished. But if not, at least due process will arguably have

been accorded LTV, its creditors and equity holders, with a full record—allowing for sound judicial review—having been made.

Thus the Court of Appeals for the Second Circuit soundly affirmed the remand order and held that PBGC's reading of ERISA section 4047 was unreasonable. The statutory language, legislative history and decisional law all fail to support the conclusion that restoration of the Plans as directed by PBGC, was appropriate under section 4047. Indeed, such conclusions as PBGC apparently reached, as predicates to its restoration directive, are patently unsound.

CONCLUSION

The action of PBGC having been arbitrary and capricious and neither in compliance with the standards set forth in the Administrative Procedure Act nor in accord with Constitutional due process, the decision of the United States Court of Appeals for the Second Circuit should be affirmed and the matter remanded to the Second Circuit for its action, essentially causing PBGC to withdraw its restoration directive and to conduct appropriate administrative proceedings.

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Dated: January 16, 1990

APPENDIX

APPENDIX A

Administrative Procedure Act

5 U.S.C. §554. Adjudications

* * *

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

5 U.S.C. §556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

* * *

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. §557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

* * *

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

- (1) proposed findings and conclusions; or
- (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
- (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;....